Chapter 11
State Measures Towards Work–Care Integration in South Africa

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Introduction

The combination of work and care has remained largely absent from the government's policy agenda in South Africa. This is surprising given the crisis of care that exists. Not only has the demand for care risen sharply in the last few years, largely as a result of HIV and AIDS, but the foundation providers of this care, namely women, families and institutions, are precariously positioned to handle it. In particular, the fragmented nature of South African family structures, and the notable absence of fathers in families and in the provision of care has been well documented (Richter and Morrell 2006; Eddy and Holborn 2011). Allied to this care crisis is the fact that women, the primary providers of care in South Africa, have been entering the labour force in greater numbers and hence face an inevitable 'time squeeze' in their efforts to combine employment with the need to provide care.

Government ministers have, only very recently, started to articulate the need for the state to become more involved in work–care integration in South Africa. For example, in her address at the launch of the Green Paper on Families (Department of Social Development 2011) on the 15 May 2012, the Deputy Minister of Social Development, Mrs. Naria Bongi Ntuli noted that there was a "need to establish comprehensive legal and policy frameworks for balancing work and family life that allow for shared care responsibility between men and women, other family members, the State, the private sector and society as a whole".

This Chapter takes this call for legal frameworks in the area of work–care integration in South Africa a step further by outlining specific recommendations for legislative reform in this area. The discussion critically examines the adequacy of current legislative measures for work–care integration in South Africa and provides recommendations for change within a framework of comprehensive legislative measures to address work–care integration.

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Legislating for Work–Care Integration in South Africa

Dancaster and Baird (2008), Cohen and Dancaster (2009a, b) and Dancaster and Cohen (2010) critically examine legislative measures for the combination of work and care in South Africa and argue that they are inadequate. The discussion in this section draws on the findings and recommendations for legislative reform from this existing research and expands on it through suggestions for additional legislative reform particularly in the areas of adoption, paternity and maternity leave.

Lewis (2006:111) notes that the following three provisions are crucial in securing genuine choice for carers to engage in paid and/or unpaid work, namely: (i) time: working time and time to care; (ii) money: cash to buy care, cash for carers; and (iii) services: for children, the sick and the elderly. The focus in this chapter is primarily on the first of these, namely time off to provide care. Considerations for legislative reform are discussed in relation to two main entitlements in this area, namely leave for caregivers and flexible working arrangements as longer term measures to accommodate employees who provide ongoing care.

This is illustrated in the framework in Fig. 11.1, which provides a comprehensive package of legislative measures regulating work and care and guides the recommendations for legislative reform discussed in this chapter. This framework recognises that leave is necessary for different reasons and at different stages to accommodate working carers and those they care for. For example, in some cases the leave is necessary for maternal wellbeing (maternity leave), at others it is necessary for infant wellbeing (maternity leave/emergency care leave) including early childhood development (parental leave) and at times it is necessary to encourage the participation of men in the provision of care (paternity and parental leave). Leave provisions that are 'muddied' such as those that permit employees to use personal sick leave to attend to ill family members, or those that incorporate maternity and/or paternity leave into parental leave, fail to recognise the different purposes of each of the leave categories identified in this framework.

Furthermore, the division of leave provisions in this framework recognises that at times there are socially desirable outcomes that may differ with each of the different leave categories. The separation of categories permits better articulation of these objectives and options for attaining these outcomes. For instance, involving fathers in infant care is achieved through a separate paternity leave and 'fathers only' parental leave provision (see discussion below) rather than a blanket inclusion under family responsibility leave or a general parental leave provision.

Finally, the comprehensive bundle of legislative provisions in this framework provides employees with choices. Not all employees will use all the leave options offered and in many cases affordability may limit use of arrangements when the arrangement results in loss of income. Nevertheless, the provision of maximum choice permits employees to tailor the solution to work–care integration to their individual needs, and recognises that there is not a one-size-fits-all solution to individual problems of work–care integration.

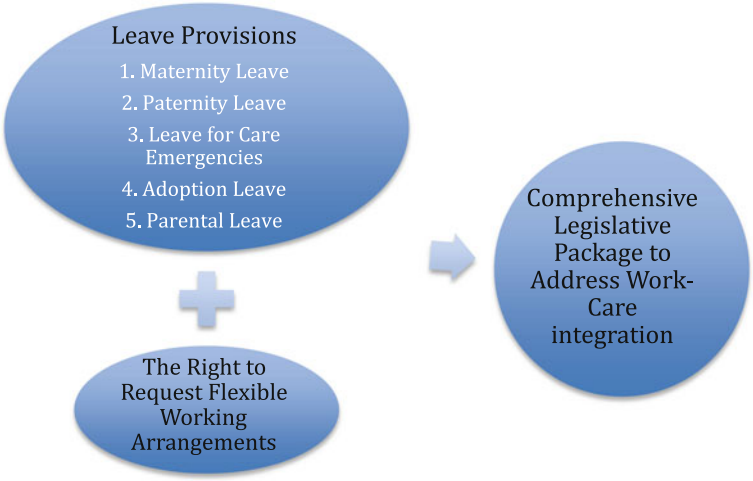

Fig. 11.1 Comprehensive legislative package to address work–care integration

Leave Provisions for Work–Care Integration

Leave Available at the Time of the Birth of a Child

Leave at the time of birth include maternity leave, adoption leave and paternity leave and each will be discussed in turn below.

Maternity and Adoption Leave

Maternity leave duration

The debate over the 'ideal' period of maternity leave embraces a range of arguments related to health protection for working mothers, equal employment opportunities for women, access to adequate antenatal and birthing care, maternal recovery, optimal nutrition for infants and gender equality within families.

The provision of 4 months maternity leave in South Africa in the Basic Conditions of Employment Act[1] (BCEA) is as good as the majority of countries in the world. A 2012 International Labour Organisation (ILO) review the duration of maternity leave by countries in its database (167 Member States) found that globally, 51 % of countries offer maternity leave of at least 14 weeks, which is the standard established by the ILO Convention 183. South Africa's 4 month duration of maternity leave is, however, not as long as that recommended in ILO recommendation 191 (18 weeks). About 20 % of the countries in the ILO database met, or

[1] 75 of 1997.

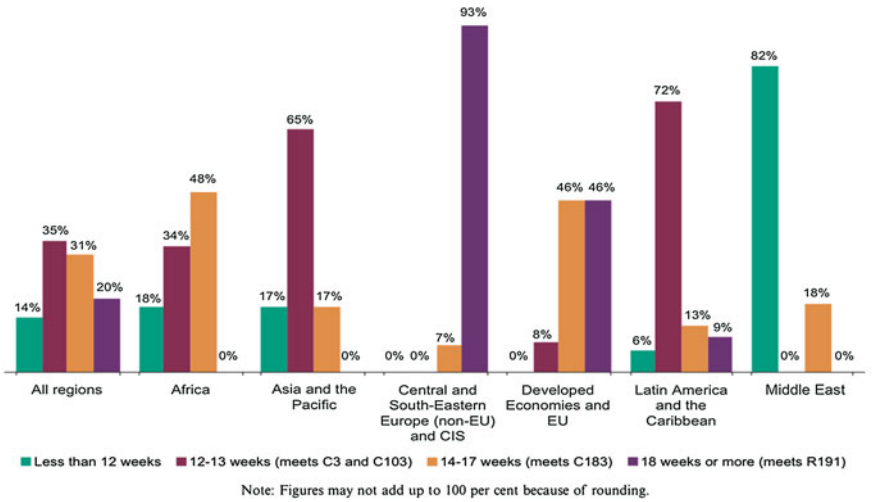

Fig. 11.2 Length of Statutory Maternity Leave, by Region, 2009 (167 countries). *Source* ILO Database of Conditions of Work and Employment Laws on maternity Protection (2009) cited by International Labour Organisation (2012)

exceeded the 18 weeks of leave suggested in Recommendation 191 (International Labour Organisation 2012). It is noteworthy that the World Health Organisation recommendation is 16 weeks, based on 4 months needed to establish breastfeeding.

The regional differences in length of maternity leave are illustrated in Fig. 11.2. It is evident from the figure that Africa lags developed economies and European Union (EU) countries as well as countries in Central and South Eastern Europe. It appears, however, to fare marginally better than countries in Asia and the Pacific and considerably better than countries in the Middle East.

Adoption leave

According to ILO Recommendation No. 191, maternity leave provisions should be available for adoptive parents to permit them to adapt to the arrival of the child. Surprisingly, there is no provision for adoption leave in the BCEA in South Africa. It is not covered in the section on maternity leave nor is leave granted for adoptive parents in terms of family responsibility leave. Nevertheless, adoptive parents who adopt a child under the age of 2 years are able to claim unemployment insurance benefits in terms of the Unemployment Insurance Act[2] (UIA) for time off during this period.

It is recommended that leave for the purposes of adoption should be included in the BCEA. This would correct the anomaly between the provision of adoption payments in the UIA and the absence of adoption leave in the BCEA. It would also correct the imbalance that exists between granting employee's time off on the

[2] 63 of 2001.

death of an adoptive parent (under family responsibility leave), but not providing the adoptive parent with time off when they adopt a child.

Combining adoption leave with maternity leave is not uncommon in legislation in a number of countries and the period of adoption leave will either correspond to that of maternity leave, or the leave entitlement for adoptive parents will be shorter than for biological parents because the prenatal leave often available for natural mothers is eliminated (International Labour Organisation 2012:56). It is recommended, however, that adoption leave should be separated from maternity leave in order to distinguish the purposes of the different types of leave and to ensure that men also have access to adoption leave in order to encourage male participation in parenting. ILO Recommendation No. 191 provides that adoption leave should be available for both parents. Maternity leave is a leave that is obviously only available to mothers and hence including adoption leave in it excludes fathers from utilising this leave.

This could be overcome if paternity leave was extended to fathers in the case of adoption, and if mothers could access maternity leave in the case of adoption. However, given the absence of a separate statutory entitlement to paternity leave in South African law (see discussion below), it is recommended that a separate provision regulating adoption leave is included in the BCEA. Not only does it overcome the difficulties mentioned above where adoption leave is included in maternity leave, but it also allows the purpose of adoption leave to be distinguished from other work–care leave provisions. The purpose of maternity leave is to contribute to the health and wellbeing of mothers and their babies (International Labour Organisation 2012:1). Adoption leave may be concerned with the wellbeing of babies provided that the child being adopted is very young, but the concerns for maternal health and wellbeing are of less significance for adoptive mothers.

The EU Directive on parental leave provides for an individual right for men and women workers to parental leave and adoption leave for at least 3 months. In some cases the adoption leave is an independent non-transferable right (e.g. Iceland) and in other cases the period of adoption leave can be taken by one parent or split between them. It is recommended that, in an effort to encourage men to become more involved in the care of their children, an independent non-transferable right to adoption leave should be considered for employees in South Africa.

The current provisions regarding access to unemployment insurance stipulate that the adopted child should be less than 2 years of age. In some countries the duration of the leave varies according to the age of the child with shorter periods being available when the adopted child is older.

The recommendations above are summarised as follows:

1. The gap in the South African law regarding the right to take adoption leave needs to be addressed. It is recommended that a separate and new provision on adoption leave be introduced into the BCEA. For the reasons provided above, it is recommended that it should not be combined with the current maternity leave provision;

2. It is recommended that this leave be drafted in a manner that encourages fathers to use the provision by making it available to both parents as an individual, non-transferable right and
3. Consideration should be given to not limiting adoption leave to instances where the child adopted is under the age of 2 and that differing durations of adoption leave should be considered according to the age of the adopted child.

Maternity payments

Debates over payment during maternity leave include who finances it, for how long and at what rate. Essentially it falls to three potential bodies to finance maternity payments either individually or in combination with one another, namely employers, taxpayers or employees. Employers, particularly small employers, argue that forcing them to finance paid maternity leave will act as a disincentive to hire young women and will erode narrow profit margins. In terms of the burden falling on the state, there are those taxpayers who argue that the decision to have children is an individual one that should not require others to shoulder the financial burden. Arguments against requiring individual employees to shoulder the burden point to the social desirability of providing state support to assist carers at the time of birth with tradeoffs for society as a whole.

ILO Conventions No. 3 and No. 103 state that employers should not be individually liable for paying maternity benefits and that benefits should be provided through social insurance and other funds. Research indicates that over the period 1994–2009 there has been a shift towards mixed systems in which employers and social security systems share responsibility for benefits and the number of countries in which employers are fully responsible for paying maternity benefits has declined slightly over this period (International Labour Organisation 2012:32).

Over half of the countries in the ILO database (53 % of 167 countries) provide cash benefits through national social security schemes. In 26 % of the countries, maternity benefits are paid solely by the employer (International Labour Organisation 2012). Figure 11.3 indicates who pays for maternity benefits in the different regions. There are marked differences between developed countries and countries in the EU who predominantly pay maternity benefits through social security schemes and countries in Africa, Asia and the Middle East which rely more heavily on employer liability.

Although South Africa would comply with ILO requirements in terms of the duration of maternity leave and the fact that maternity pay is financed through social security obtained from contributions by both employers and employees, it falls short of ILO standards in terms of the amount of maternity pay that employees receive (Olivier et al. 2011). In order to comply with Convention No. 183, the cash benefit paid during maternity leave should be at least two-thirds of a woman's previous earnings. UIF in South Africa range from 31 to 59 % depending on income but even at the top end, the payment falls short of the two-thirds required in the ILO Convention.

Article 7 of Convention No. 183 provides for countries with 'insufficiently developed' economies and social security systems and recommends that they

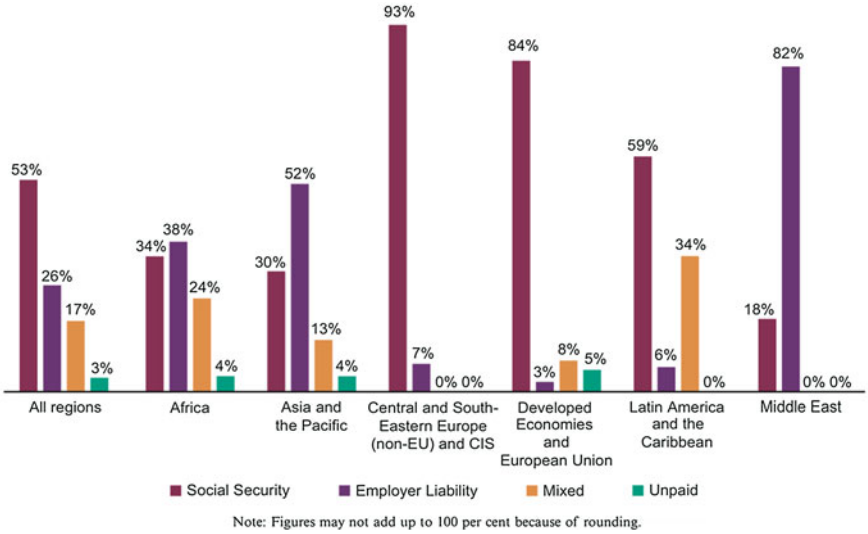

Fig. 11.3 Who Pays for Maternity Leave, by Region. *Source* ILO Database of Work and Employment Laws on Maternity Protection, ILO 2009 cited by International Labour Organisation (2012)

should pay cash benefits at a rate no lower than the rate payable for sickness or temporary disability in national laws and regulations. It is debatable whether or not South Africa, a middle-income country[3] with a fairly comprehensive social security system, would fall under the Article 7 'exceptions'. Nevertheless, the BCEA provides for fully paid sick leave for a period equal to the number of days an employee works in a 6-week period over a 36-month cycle. Accordingly, it is argued that Article 7 would provide no foundation for arguing that South Africa could comply with this Convention as it stands.

Furthermore, employees in South Africa who have not contributed to the UIF for a sufficiently long period of time, would not be entitled to receive the full period of maternity leave as paid (albeit partially) leave. This is because benefits from the fund accrue at 1 day's benefit per 6 days worked and accordingly to access the full entitlement of 17.32 weeks (121 days) an employee would need to have built up benefits by working for approximately 2 years.

In addition the benefits accumulated for payout will be reduced if an employee has claimed unemployment insurance benefits for another reason (e.g. illness or unemployment).[4] Accordingly, the right to the full entitlement of maternity pay in South Africa is conditional on having sufficient benefits built up through payments into the unemployment insurance fund, and not having reduced these benefits

[3] South Africa is classified by the World Bank as an upper middle-income country.

[4] The only instance in which the benefits are not reduced is where they have been paid out for maternity leave.

through the use of unemployment insurance payments for one of the benefit categories recognised in the UIA.

In 2004, the ILO Committee of Experts noted that in many countries the provision of cash maternity benefits is subject to a minimum qualifying period or coverage by the insurance system. The Committee accepted these restrictions, provided that the qualifying periods are set at a reasonable level and that women who do not meet the condition are provided (subject to certain means related conditions) with benefits financed through social assistance funds (International Labour Organisation 2012). It is doubtful as to whether 2 years is a reasonable qualifying period in order to access the full period of maternity pay. Furthermore, in South Africa there is no alternative benefit financed through social assistance to fund mothers who have not accumulated sufficient funds in UIF to provide them with payment during maternity leave. It is acknowledged that there are social grants for child support[5] but these are means-tested and not intended as a substitute for the lack of maternity pay, but rather as a measure for poverty alleviation. Consideration should be given to measures to assist employees who are unable, through length of service, to receive full maternity payments from UIF.

It is also recommended that the level of maternity payments should be increased. Olivier et al. (2011) recommend that maternity benefits should be no less than two-thirds of the woman's previous earnings to align maternity payments with international standards and to facilitate the ratification of ILO Maternity Protection Convention (183 of 2000). It has also been argued that the low rate of income replacement granted to women in South Africa during maternity leave forces many mothers to return to work before exhausting their leave entitlement (Dupper et al. 2000, 2001).

This debate on level of payments during maternity leave should include considerations on whether or not the current system of contributory social insurance is adequate for the purposes of maternity pay. In summary, some of the concerns emerging from the current system include the fact that:

- Many people in the informal economy and self-employed women are excluded from the benefits because they cannot contribute to the fund;
- Benefits are dependent on the length of contribution and in the case of maternity benefits it takes 2 years to accumulate the 17.32 week full entitlement; and
- Maternity benefits 'compete' with other benefits that can be accessed from the fund which means that if previous benefits have been accessed it may take more than 2 years to be able to access the full 17.32 week entitlement.

[5] Child support grants are provided to primary caregivers over the age of 16 in the amount of R270 per month (from October 2011) if they care for a child under the age of 18 years and if they pass a means test. According to the means test the caregiver's monthly income must not exceed R31,200 or, if married, their joint income must not exceed R62,400 per month. These grants have been criticised for being cumbersome in terms of application procedures, limited in their application and inadequate in terms of monetary payment and duration (Mpedi 2008; Lund 2009).

There are alternatives within the current system to increase both the coverage and benefits for maternity pay. Coverage may be increased through a system of voluntary participation (Mpedi 2008) and the level of benefits could be increased though increasing the employer and/or employee contribution to the fund or through increased contributions from the state into the fund (Olivier et al. 2011). Employers could be required by law to 'top up' the amount received by employees from UIF with the caution, however, that depending on the level of 'top up', this could work against promoting gender equality in the workplace. A further suggestion for consideration is for social assistance packages to support employees who do not fall within the ambit of UIF benefits for maternity leave either because they fall outside the legislation, or because they have not accumulated enough in the way of benefits or have exhausted their benefits. India has a system of providing this type of social support to marginalised sectors of employment whereby a tax is levied on the production, sale or export of specified goods to cater for the needs of those in the informal sector (Mpedi 2008).

There is also merit in the argument (see Olivier et al. 2011) that maternity payments should be removed altogether from the unemployment insurance scheme in its current form and be dealt with in a separate legislative provision. This would separate it from unemployment benefits, which have different considerations given that they apply in circumstances relating to a complete loss of employment and not a temporary absence.

These (and other) alternatives need to be debated with a view in improving the current deficiencies that exist in South Africa regarding maternity pay.

Paternity Leave

The importance of the presence of fathers at and after the birth of their children has been recognised, not only in terms of the bonding between father and child, but also for the support fathers can give to mothers after childbirth. Leave for fathers over the time of the birth of a child is provided to a very minimal extent in South Africa. There is no separate entitlement to paternity leave in South Africa. It forms part of the 3 days (5 days for domestic workers) that can be taken by an employee in terms of the BCEA as paid family responsibility leave for sickness of a child; birth of a child and/or death of a spouse or life partner, parent or adoptive parent, grandparent, child or adopted child, grandchild and/or sibling.

There are a number of problems with the combination of paternity leave with legislated family responsibility leave in its current form:

- It is only available to employees who work four or more days per week;
- It is only available to employees who have worked for longer than 4 months;
- It is not targeted at male employees—it is available to all employees (both male and female) and hence from a gender equality perspective it does not target men as fathers and the protection and encouragement of this role and

- The duration is too short. It is limited to 3 days per annum, which is reduced if it has already utilised for the other purposes for which it can be used (death, sickness, etc.).

The need to get men involved in fatherhood and care duties in general in South Africa has been highlighted (Morrell and Jewkes 2011; Department of Social Development 2011). Morrell and Richter (2006) note that most South African men do not seem especially interested in their children. "They seldom attend the births of their own, they don't always acknowledge that their children are their own, and they frequently fail to participate in their children's lives" (Morrell and Richter 2006:2). Nevertheless, it has been acknowledged that "fathers can make a major contribution to the health of South African society by caring for children and producing a new generation of South Africans for whom fathers will be significant by their presence rather than their absence" (Richter and Morrell 2006:6).

Smit's (2002) study of South African men has found that those who make use of paternity leave will not only be more involved in domestic task responsibilities and the rearing and care-taking of children, but will also be inclined to perform emotion work in the marriage leading to increased marital satisfaction.

The trend internationally is towards separate legislated paid paternity leave. It has been observed that:

> Overall, paternity leave provisions are becoming increasingly common, which may be an indicator of the growing importance attached to the presence of the father around the time of childbirth (International Labour Organisation 2012).

A number of countries in Africa (Algeria, Dijibouti, Kenya, Rwanda, Tanzania, Tunisia and Uganda) offer paid paternity leave ranging from 1 day (Tunisia) to 2 weeks in Kenya (International Labour Organisation 2012).

It is recommended that paternity leave be removed from the provision regulating family responsibility leave and that a separate paternity leave provision should be introduced in the BCEA. The duration of this leave should be considered in the context of other provisions (such as a parental leave provision, were this to be introduced—see discussion below) that provide leave for fathers to attend to childcare. It is also recommended that paternity leave be fully paid. The research from other countries indicates that men do not tend to take up their right to paternity leave to any great extent if the provision is unpaid or paid at low rates (Moss and O'Brien 2006; Whitehouse et al. 2007). The source of payment should mirror considerations regarding the funding of maternity pay and this has been highlighted for debate in the previous section.

Leave Available to Care for a Young Child (Parental Leave)

While maternity leave aims to protect working women during their pregnancy and recovery from childbirth, parental leave refers to a relatively long-term leave available to either parent, allowing them to take care of an infant or young child

over a period of time usually following the maternity or paternity leave period (International Labour Organisation 2012).

Parental leave is encouraged in ILO Recommendations[6] and in EU Directives. Indeed, the trend in the EU and other industrialised economies, as well as in Central and Southern Europe (non-EU) and Commonwealth of Independent States countries is towards the provision of parental leave, and almost all these countries have some kind of parental or childcare leave provisions. Conversely, parental leave it is rather rare in developing countries and in less industrialised parts of the world (International Labour Organisation 2012). Two countries from Africa appear to offer parental leave—in Burkina Faso, male or female employees can request up to 6 months of unpaid leave to care for their children and in the case of illness, the leave period can be extended to 1 year. In Guinea, after the expiration of the 14-week maternity leave period, women may take an additional 9 months of unpaid leave. In some countries there is scope for flexibility on how and when to take this leave—in some cases it can be taken on a part-time basis, whether as a continuous period after maternity/paternity leave or is split over a period when the child is young (International Labour Organisation 2012).

In many countries parental leave is a shared entitlement between men and women although studies show that women are more likely than men to take it up (Whitehouse et al. 2007; Moss 2011), hence the introduction of a period of 'fathers only' parental leave in Norway which is lost if it is not used by the male parent. Studies also indicate that take-up rates by both parents can be low where parental leave is unpaid (Moss 2011).

With regard to payment during this period, Dupper et al. (2011) argue for a 'carers benefit' to be financed through a social insurance scheme providing also for maternity and adoption benefits and separated from the current unemployment insurance scheme. A 'carers benefit' would provide payments to employees who 'resign or suspend their employment for any *compelling family reason*'. This would include the purposes of taking care of children or to care for a terminally ill family member.

Parental leave is non-existent in South Africa and there is no legislative entitlement to it. Thus, employees who wish to continue to care for their children for any period of time after maternity leave will have to resign from employment or use their annual leave unless they are able to get consent for this type of leave from their employer (Dancaster and Baird 2008). It is recommended, therefore, that a separate provision regulating parental leave be introduced into the BCEA. There are a number of reasons for recommending the introduction of parental leave in South Africa:

[6] Recommendation No. 191 (accompanying Convention No. 183 on maternity protection) and Recommendation No. 165 (accompanying the Workers with Family Responsibilities Convention, 1981 (No. 156)) contain provisions on parental leave and the EU Directive on Parental Leave provides for no less than 3 months parental leave.

1. Parental leave encourages early childhood development by those shown to be most effective in providing this—namely, parents. This is particularly the case in a country like South Africa where state supported childcare services are limited;
2. The absence of any leave after maternity and/or paternity leave to care for young children may have the effect of women leaving the workplace to attend to this function. Kingdon and Knight (2004) note that that women in South Africa are more than twice as likely to resign from employment as men.
   "Working women may quit voluntarily for child-bearing and -rearing and, being usually the secondary income earners in the family, are also more likely than men to give up their work in case of family emergencies or migration of spouse" (Kingdon and Knight, 2004:203)
3. If fatherhood it to be encouraged and equal sharing of care is to be promoted then parental leave that is available as a shared entitlement, is one legislative measure to encourage this and
4. True equality of opportunity in employment, as defined by the ILO Discrimination (Employment and Occupation) Convention requires a work–family schema that permits workers to undertake their care responsibilities without loss of contact with the workforce. In circumstances where the bulk of care work is undertaken by women, failure to institute a scheme which permits job-protected time off from work to care for children is arguably at odds with commitments under this Convention (Murray 2004:20).

Questions regarding the duration and payment for this leave need to be debated at a national level.

Leave for Care Emergencies

Workers with care responsibilities may need to take time off to attend to unexpected care emergencies such as sudden illness of a child or dependent family member or the last minute unavailability of a substitute caregiver. This is different from anticipated and ongoing care such as the care of young children or those with special needs, elderly parents or someone infected with HIV and AIDS.

The need to consider revising the current legislated provision on family responsibility leave in terms of the removing the clause providing for family responsibility leave in the case of the birth of a child and the introduction of a separate provision regulating paternity leave has already been discussed above. In addition, it is recommended that in the context of care for leave emergencies the family responsibility leave provision is in need of revision. The reasons are as follows (Dancaster and Baird 2008):

1. Family responsibility leave in its current form is only for the birth or illness of a child. Accordingly, this leave is not available to attend to a sick adult dependent. Ironically, if the absence is to attend the death of an individual then the

scope of persons for whom it may be utilised is far wider: spouse or life partner, or their parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling (Dancaster and Baird 2008). There is a need to examine whether or not family responsibility leave to attend to sick children should not be extended to include a broader range of dependents given the high prevalence of HIV and AIDS and the need for care for sick adult dependents[7] (Dancaster and Baird 2008:32).

2. Family responsibility leave is limited to time off to attend to birth, sickness and death only. In addition to the use of this leave for sickness and death, it is recommended that the provision be widened to include the utilisation of this leave for unexpected disruptions in care such as the failure of the substitute caregiver to arrive for work or unexpected incidents at school that require attendance by a caregiver. Given the widespread use of domestic workers as carers and the difficulties these employees face in terms of getting to and from work using the (sometimes unreliable) forms of public transport in South Africa, the widening of this provision to cover unexpected disruptions of this nature would be useful. Furthermore, the increase in strikes by teachers in primary and secondary schools has increased the need for parents to make emergency arrangements for children in these circumstances.

The Right to Request Flexible Working Arrangements

Flexible working arrangements can assist employees combine paid work and caregiving by allowing them to remain employed whilst making changes to their hours and/or place of work. There has been increasing recognition by governments towards the fact that specific legislation is required that grants employees the right to request flexible working arrangements from their employers. Hegewisch and Gornick (2008) reviewed statutory laws aimed at increasing workers ability to change working hours and arrangements in twenty high-income countries and notes that a large majority of these countries had introduced flexible working statutes. The United Kingdom, Australia and New Zealand are examples of three such countries that have introduced this legislation in the last 10 years as part of a number of measures to assist employees as caregivers.

The connection between flexible working arrangements in the context of assisting employees to combine work and care is evident in the recognition given to it in the Convention on Part-time Work. The Convention on Part-time Work requires that ‘laws and regulations that may prevent or discourage recourse to or acceptance of part-time work’ be reviewed to ‘facilitate access to productive and freely chosen part-time work which meets the needs of both employers and

[7] 55 of 1998.

workers' (Article 9). "The needs of workers with family responsibilities are explicitly recognised in the section requiring 'special attention, in employment policies' to specific groups including 'workers with family responsibilities' (Article 2(c)). The Convention further requires that 'where appropriate, measures shall be taken to ensure that the transfer from full-time to part-time work or vice versa is voluntary, in accordance with national law and practice' (Article 10)" (Murray 2004:21).

There are a number of reasons advanced for the adoption of this legislative right in these countries:

1. Existing anti-discrimination legislation has not been sufficient to assist employees advance this right and to place an obligation on employers to seriously consider employee requests to work flexibly (Smith 2006). As noted by Smith and Riley (2004:204) "any system of regulation that relies on traditionally disempowered individuals being able to navigate the legal system to enforce rights is inherently limited";
2. A positive law such as this one, not only places an obligation on employers to seriously consider employee requests to work flexibly, but also provides a (usually fairly simple) procedure for employees to claim it from their employer (Murray 2005);
3. Employee requested flexibility provides employees with care responsibilities a choice regarding the nature of their work arrangements, in some cases with a trade-off in income, and is increasingly being seen as part of a composite body of legislative measures to assist employees as caregivers.

Cohen and Dancaster (2009a, b) argue for a specific right to request flexible working arrangements in South African law. In doing so they consider the legislative framework that prohibits family responsibility discrimination in South Africa, namely the Employment Equity Act, (see foot note 7) and note that the South African experience has revealed that the legislative provision governing family responsibility discrimination remains grossly under-utilised and ineffective. Not a single family responsibility discrimination case involving a request for flexible working has been brought since the enactment of the Act (Cohen and Dancaster 2009a). They posit that this may be the result of the high costs of litigation, the difficulty in obtaining legal aid and that employees may be reluctant to engage in a 'naming, blaming and claiming' (Charlesworth 2005) process with difficult evidentiary requirements in showing discriminatory treatment and identifying an appropriate comparator. They also note that high unemployment rates in South Africa that make any job better than no job, discourages employees from jeopardising existing employment relationships with requests that involve a reorganisation of standardised working hours. In addition they point out the long entrenched societal practices and cultural norms around the 'ideal worker' and note the subtle gender assumptions and stereotyping of members of the judiciary.

Apart from the failings of anti-discrimination legislation to protect and advance this right in South Africa, there are additional arguments in favour of the introduction of this right:

1. Research on the characteristics of carers of people living with HIV and AIDS shows that some of the financial impact of caring is as a result of giving up work to care (Akintola 2004; Rajaraman et al. 2006). This break in employment, particularly in a country with high unemployment may be catastrophic in terms of trying to re-enter the labour force when the care demand ends. In such instances a reduction in working hours through flexible working arrangements, even though it results in lower income, may be preferable in that some income is maintained and so is labour force attachment;
2. Evidence from employer and employee surveys carried out after the introduction of this legislation in the UK point to its positive impact on employees and also indicate that employer's fears that they would be inundated with requests to work flexibly were unfounded (Holt and Granger 2005; Hayward et al. 2007);
3. Research among South African employers shows that they are not voluntarily implementing flexible working arrangements to assist employees as caregivers in formal policy provisions to any great extent (Dancaster 2012).

A brief consideration of this right in other countries is useful in considering its possible introduction in South African law. The policy motivations behind the right to request flexible working arrangements varies—in Germany the introduction of the general right to work part-time was motivated by considerations of job creation and affirmative action rather than work–care concerns (Jacobs and Schmidt 2001). In the United Kingdom, New Zealand and Australia the introduction of the right to request flexible working arrangements reflects government's commitment to supporting working families (Croucher and Kelliher 2005). Not surprising therefore, the target groups have varied with the German right being available to all employees irrespective of the reason for their request and the United Kingdom right being available to parents of children and more recently also to careers of adults in need of care.

There are also inter-country differences in terms of qualifications for use, both in terms of the size of the employer and employee duration of employment (Hegewisch and Gornick 2008). For instance, there are differences in terms of how often an employee may make such a request, the type of flexible working arrangements that may be requested, the procedure for the requests and basis on which employers can refuse such a request (Hegewisch and Gornick 2008). In the Netherlands employers are subject to the strongest test in denying a request and may only do so if there are 'serious countervailing reasons' and in Germany the refusal can be based on 'business or organisational reasons' but these need not be 'serious'. In the United Kingdom employers can refuse a request based on the burden of additional costs; detrimental effect on the ability to re-organise work among existing staff or to recruit additional staff; insufficiency of work during the period when the employee proposes to return to work and planned structural change. In all cases, changes result in a permanent alteration of the employment contract.

Conclusion

The role of the state in work–care integration, and specifically in the regulation of leave provisions that give employees more time to care has been on the increase in many countries, particularly in Europe (Moss and O'Brien 2006). Some of the different articulated rationales governing state policy on work and family include the need to support and strengthen families, to ensure that both paid and unpaid work are equally valued, to encourage the growth of employment generally by ensuring that those with care responsibilities are not lost to the workforce altogether, to improve the quality, as well as the quantity, of employment (this is a key objective of both the ILO and the EU) and/or to bolster the labour market's capacity in times of ageing populations and falling fertility rates (Murray 2004).

This chapter has argued for an increase in the regulation of work–care integration by the state in South Africa. Specific recommendations for legislative reform have been outlined with reference to comparative legislative provisions both in developed and developing nations. The discussion on legislative measures for work–care integration has highlighted the fact that, in terms of a comprehensive bundle of work–care leave provisions that incorporate maternity leave, adoption leave, paternity leave, parental leave and emergency care leave, South Africa has only one of these in its 'pure' form, namely maternity leave. Paternity leave is combined with emergency care leave and there are no legislative provisions for adoption leave or parental leave. It has also noted that the Employment Equity Act has not achieved much in the way of the advancement of employee's rights to work flexibly in circumstances involving family responsibility requirements despite the fact that the provision in the EEA on family responsibility discrimination and affirmative action provide potential avenues for employees to achieve flexible working arrangements in the context of care giving (Cohen and Dancaster 2009a).

There needs to be recognition on the part of the state that leaving work–care integration concerns to other actors such as employers and trade unions means that the burden of care remains essentially on females in households in South Africa. Evidence reveals that employers in South Africa are not improving on legislative minima regulating leave for care purposes to any great extent (Dancaster 2012) nor are South African trade unions bargaining over issues relating to gendered conditions to any great extent (Labour Research Service 2011). Unless there is political will on the part of government towards assisting employees with work–care integration and a commitment by employers to improving the way in which employees combine work and care, and unless the actors come together to discuss and debate issues affecting work–care integration in South Africa, the burden of combining work and care will continue to remain on those, primarily female, individual members in households.

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